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IN THE

Supreme Court of the United States

October Term, 1962

No. 191

INTERNATIONAL SHOE MACHINE CORPORATION,

Petitioner,

against

UNITED SHOE MACHINERY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

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No. .....

INTERNATIONAL SHOE MACHINE CORPORATION,

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against

UNITED SHOE MACHINERY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on March 11, 1963.

Citations to Opinion Below

The opinion of the United States Court of Appeals for the First Circuit dated and filed March 11, 1963, reprinted as Appendix A, *infra*, is not yet officially reported.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was dated and entered on March 11, 1963. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether the court below erred as a matter of law in its holding that at the trial before a jury of an action for treble damages brought by a manufacturer of shoe machinery under Section 4 of the Clayton Act claiming injury to his business or property growing out of a violation of Section 2 of the Sherman Act by defendant manufacturer of shoe machinery, the trial court properly excluded from evidence the final decree and certain findings of fact and conclusions in *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954) (hereinafter referred to as the Government case) in which defendant below was also the defendant. The final decree and findings were offered by plaintiff under Section 5(a) of the Clayton Act, 15 U. S. C. §16(a) as prima facie evidence of defendant's unlawful conduct during the limitations period. The trial court's ruling was that said final decree, though made and entered at least seventeen months within the statute of limitations period open to plaintiff and relevant to plaintiff's proof, must be related back to and could speak no later than the date of the close of the taking of evidence in that case, some eighteen months prior to the statute of limitations period open to plaintiff, and was, therefore, inadmissible.

2. Whether the court below erred as a matter of law in its holding that the trial court properly excluded evidence offered by plaintiff including the above described Government decree on the ground that a government decree is inadmissible as background evidence under Section 5(a) and that evidence of any conduct which occurred prior to the limitations period for which plaintiff was permitted to prove damage was inadmissible either as essential and

relevant support for plaintiff's proof of acts of monopolization within the limitations period or as essential background evidence to an understanding of such proof of plaintiff and as proof of the manner in which defendant's monopolistic power had been acquired and was maintained.

Statutes Involved

Plaintiff brought its action under Section 4 of the Clayton Act to recover damages for violation of Section 2 of the Sherman Act.

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731. 15 U. S. C. §15.

Section 5 of the Clayton Act provides:

> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel

as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. Oct. 15, 1914, c. 323, §5, 38 Stat. 731; July 7, 1955, c. 283, §2, 69 Stat. 283. 15 U. S. C. §16.

Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282. 15 U. S. C. §2.

Statement of the Case

Petitioner (plaintiff-appellant below), a Massachusetts corporation with its principal place of business in Cambridge, Massachusetts, is engaged in the manufacture of shoe machinery—particularly shoe machinery used in the lasting operation of shoe construction (PR. 4). Lasting is the process of fastening the upper of the shoe to the insole (PR. 77-78).

Respondent (defendant-appellee below), a New Jersey corporation with its principal place of business in Boston, Massachusetts (PR. 4), is the largest manufacturer of shoe machinery in the United States (PR. 6). It manufactures a complete line of shoe machinery including that used in the lasting operation (PR. 5).

On December 14, 1956 plaintiff below filed a complaint in the United States District Court for the District of Massachusetts seeking to recover treble damages under Section 4 of the Clayton Act for violations of Section 2 of the Sherman Act alleged to have been committed by defendant below (PR. 1-7). The complaint alleged that beginning some time prior to 1938 and continuing up to the date of filing the complaint, defendant had monopolized trade and commerce in shoe machinery and the parts thereof (PR. 6) and that as a result plaintiff had been prevented from obtaining a fair competitive share of the market in such machinery and had consequently suffered a substantial loss of profits (PR. 7). The acts done and the means used to monopolize trade and commerce were substantially the same as those alleged in the complaint in the Government case (PR. 6-7).

Defendant answered. The period left open by the applicable statute of limitations was the four year period from December 14, 1952 to December 14, 1956.

Plaintiff sought to obtain a pre-trial order permitting it to introduce at any time during the trial the final decree and parts of the findings of fact and opinions in the Government case as prima facie evidence. The trial court deferred decision until the close of plaintiff's other evidence and forbade the parties to make any reference to any aspect of the Government case within the hearing of the jury (PR. 15). The case went to trial before a jury and at the close of plaintiff's evidence the admissibility of the decree and findings in the Government case was again argued and the trial court held them to be inadmissible on the ground that:

> "In the Government case Judge Wyzanski closed the taking of evidence as of a date in June of 1951, some 18 months prior to the period which is open to the plaintiff in the instant case, namely, the period December 14, 1952 to December 14, 1956.
>
> "I do not read Judge Wyzanski's findings of fact as reflecting that any conduct of defendant which occurred between December 14, 1952 and December 14, 1956 was put in issue or litigated in the Government case." (PR. 1086)

The trial court amended its pre-trial order accordingly (PR. 17).

The significant dates of the Government case are the following:

June 22, 1951: Close of evidence;

February 18, 1953: Findings of fact and conclusions of law, opinions and final decree entered, 110 F. Supp. 295;

May 17, 1954: Per Curiam decision of Supreme Court, on appeal, that:

> "The case having been fully argued and the Court being satisfied that the findings are justified by the evidence and support the decree, the judgment is affirmed," 347 U. S. 521;

June 23, 1954: Final judgment entered on mandate; and

June 1, 1955: Approval by District Court of plan to terminate outstanding leases under Paragraph 9 of the final judgment.

All of the above dates, except the date of the close of evidence, are within the four year period open to plaintiff.

The trial court not only excluded the findings and decree but was scrupulous in its determination that the jury should be barred from knowledge that any such thing as the Government case had ever existed. For example, the trial court required that all references to the Government case be excised from documentary evidence offered by plaintiff (PR. 198, 285, 415-16, 1088-89) and refused to permit plaintiff to examine witnesses concerning the effect of the Government case and the change in business practices resulting therefrom on both plaintiff's and defendant's businesses (PR. 289-90, 293-94, 337-42, 515-16, 597-99, 600-02).

At the close of the evidence the case was submitted to the jury in the form of requests for answers to five special interrogatories posed pursuant to Rule 49 of the Federal Rules of Civil Procedure:

> Question 1. Do you find by a preponderance of the evidence that, during the period from December

14, 1952 to December 14, 1956, the defendant United Shoe Machinery Corporation committed acts of monopolization so as to control and dominate interstate trade and commerce in the distribution of shoe machinery (other than Dry Thread Sewing Machines) in the United States, to such an extent as to exclude actual and potential competitors from that field of interstate commerce? (PR. 1465)

Question 2. Do you find upon a preponderance of the evidence that during the period from December 14, 1552 to December 14, 1956, defendant United Shoe Machinery Corporation committed acts of monopolization so as to control and dominate interstate commerce in side and toe lasting machines to such an extent as to exclude actual and potential competitors from interstate commerce in side and toe lasting machines? (PR. 1465)

Question 3. Do you find upon a preponderance of the evidence that such acts of monopolization during that period were the proximate cause of injury to the business or property of the plaintiff? (PR. 1470-71)

Questions 4 and 5 related to damages.

The jury answered Yes to the first question and No to the second and third and left the fourth and fifth unanswered (PR. 1487-88). Judgment for defendant was entered upon this verdict (PR. 3).

Plaintiff's motions to vacate judgment and for a new trial were denied (PR. 3). Plaintiff appealed to the Court of Appeals for the First Circuit and that court affirmed the judgment. On that appeal the questions which are herein presented were raised and decided adversely to plaintiff-appellant-petitioner.

Reasons for Granting the Writ

The United States Court of Appeals for the First Circuit has decided two important questions of federal law which have not been, but should be, settled by this court.

1. The Court of Appeals has construed Section 5(a) of the Clayton Act, 15 U. S. C. §16(a), in a manner in conflict with and in disregard of both its language and legislative purpose. It has construed it so as to add a serious burden of litigation to all private parties seeking damages for injury to their business or property from violations of the antitrust laws, instead of giving effect to the express language of the statute and the legislative purpose to reduce such burdens.

The question decided is of far reaching importance to treble damage litigants and should be settled by this court so that the efficacy of a private action in complementing the Government in the enforcement of the antitrust laws may not be weakened and impaired by unwarranted judicial construction of the plain language of the statute.

The first and basic error of the Court of Appeals, we submit, is in its construction of the estoppel requirement of Section 5(a) of the Clayton Act. The court held that the matters put in issue and directly determined in a Government case are to be determined for purposes of the estoppel requirement by selection of a date and the court selected the date of the close of evidence in the prior case. The court below found that the selected date was eighteen months prior to the commencement of the four-year period and on this basis alone held that a final decree offered under Section 5(a) could speak no later than the selected date and, therefore, was inadmissible.

The construction of Section 5(a) of the Clayton Act is a major step in the direction of defeating the purpose of Congress "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions," *Emich Motors* v. *General Motors*, 340 U. S. 558 at 568 (1951).

This decision runs directly counter to the language of Section 5(a) which declares that "A final judgment or decree . . . shall be prima facie evidence against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Under Section 5(a) it is the "judgment or decree" that creates the estoppel. No estoppel grows out of the close of evidence. The final decree was of unquestioned relevance and it was entered within the limitations period. The decision denied this evidence to plaintiff.

The added burdens placed upon treble damage plaintiffs by this decision are onerous.

Thus, a plaintiff may commence his action within one year after "the pendency"* of a Government case. If he does this, the prima facie evidence under Section 5(a) will only be available to him up to a fixed date—the close of evidence. The final judgment and the estoppel that it works under Section 5(a) are both ignored under this decision. The result is that the treble damage plaintiff is put to his independent proof as to all acts since the selected date. He must take on the full burden without the aid of "all matters previously established by the Government" as this

* He may do so under 15 U. S. C. §16(b).

court declared in the *Emich* case, *supra*. His burdens are increased, not minimized.

If, as he may,* he brings his action at any later date he may be wholly barred from use of the final decree if, by the accident of time, evidence closed prior to the four year period of the statute of limitations open to him. That is what happened here. The time between close of evidence and disposition in final approval of the plan to terminate the objectionable leases under the final judgment in the present case was almost four years. The estoppel of the judgment must be ignored to reach this result. Even if evidence closed within the four year period (the estoppel is tied to that date under the decision below) plaintiff suffers the added burden, already noted, that "all matters previously established by the Government" are cut off at the earlier date and he must bear his burden of proof in full for a far longer period.

The foregoing results do such violence to the plain purpose of Section 5 that they emphasize the basic error of the Court of Appeals and the need for correction.

We submit that the matters in issue and determined in a Government case speak through the judgment or decree that may be offered in evidence under Section 5(a) and they speak as of the date when the judgment or decree becomes final. It is then that the estoppel of the judgment or decree takes place under Section 5(a). The record facts are surely presumed to continue until decision is reached, absent a showing of mootness or some other reason that forecloses the need for decision. Trial and appellate judges, par-

* under the four year statute of limitations, 15 U. S. C. §15b.

ticularly in equity cases, deal with facts as they exist when decision is reached and which reveal the present and continuing need for corrective action as in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952). Cf. *United States* v. *Parke, Davis & Co.*, 365 U. S. 125 (1961); *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953); *United States* v. *Hamburg-American Co.*, 239 U. S. 466 (1916).

2. In addition, the Court of Appeals compounded its basic error by its further holding that the four year limitations period was also proper as the cut-off date for plaintiff's proof. Plaintiff was thus required to prove its entire case—including violation of the antitrust laws and injury to it as a result thereof—by evidence of events that occurred during the four year period of the statute of limitations.*

This ruling was arbitrary and prejudicial in the extreme. In effect the Court of Appeals held that proof of earlier monopolization was irrelevant and immaterial to proof of monopolization within the limitations period.

The most important evidence excluded under this arbitrary ruling were the matters in issue and determined by the Government decree. This and the supporting findings were denied admissibility even as essential and relevant background of plaintiff's proof of monopolization during the limitations period or as essential background to an

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* Paragraph 5 of the pre-trial order of October 24, 1961 (PR. 15), referred to by the Court of Appeals (Appendix A-4), which purported to permit either party to introduce relevant background evidence was simply ignored by the trial court.

understanding of such proof and as proof of the manner in which defendant's monopolistic power had been acquired and maintained.

We submit that this holding denies to plaintiff prima facie evidence made available to it by Section 5(a). This evidence meets the estoppel requirement of Section 5(a), even under the holding below that estoppel takes place on the date of the close of evidence. The Court of Appeals does not question its relevance. Section 5(a) makes no such distinction as the court below made between prima facie evidence that may be received as proof within the limitations period or as essential background.

Plaintiff was trying to prove, as it was required to do, monopolization by defendant during the limitations period of exactly the same kind that was carried on prior thereto. Monopolization is not like stealing an automobile or robbing a bank. It is, on the contrary, an offense found in a course of conduct over a period of years—many years, as the Government's proof in the Government case shows so vividly. The Government in its case, of course, was not limited in its proof by any statute of limitations. Its proof covered a span of more than thirty-five years and yet it was essential to show a contemporary violation to warrant relief by injunction.

It is hard to imagine any evidence more relevant to aid plaintiff in meeting its severe burden of proving monopolization during the four year period. It is hard to imagine any evidence that falls more clearly within the purpose of Congress in enacting Section 5.

The plain fact is that this ruling kept from the jury the single most important fact in the history of the shoe machinery industry. They were denied knowledge that the same leases containing the same restrictive provisions that they were asked to consider had been found to have been the means used by defendant to monopolize the shoe machinery market. In short, this and other conduct, all of which were continued into the limitations period were found to have been violative of the antitrust laws and to have constituted a part of the means by which defendant had unlawfully acquired its monopolistic power.

It is no wonder that under the District Court's rulings the jury answered Questions 2 and 3 in the negative. The prejudice to plaintiff is clear.

Question 2 asked whether defendant had monopolized trade in side and toe lasting machines. These were the machines that plaintiff marketed in competition with defendant. Excluded findings in the Government case showed monopolization of lasting machines in the range of 96% to 100% (PR. 24, 26).* This error was assuredly not cured by the jury's answer to Question 1 that defendant had monopolized shoe machinery generally. With the full findings of the Government case before it, the jury might well have also answered Question 2 affirmatively.

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* Also there were findings that by any measuring rod defendant "supplies 75% to 95% of the total current demand for shoe machinery" (PR. 27) and the adjudication under paragraphs 1 and 2 of the decree entered February 18, 1953 that defendant monopolized "all types" of shoe machinery (PR. 55).

Question 3 asked the jury whether the acts of monopolization were the proximate cause of injury to plaintiff's business or property. The negative answer to this question, too, might well have been different had the jury not been denied knowledge of the findings of the Government case respecting the restrictive and exclusionary provisions of defendant's leasing system which, with other conduct, were declared in the Government case to have been the means whereby defendant monopolized the shoe machinery market and thus excluded competitive manufacturers such as plaintiff.*

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* See especially the declaration in paragraph 4 of the decree that all of defendant's leases which contained a ten-year term, a full capacity clause or deferred payment charges and all leases under which repair and other services were provided without separate charges were means whereby defendant monopolized the shoe machinery market (PR. 56); the comprehensive findings dealing with each of the restrictive and exclusionary features of the leases (PR. 28-47); and the findings as to the full deterrent effect of the leasing system upon competitors such as plaintiff (PR. 40-42, 49-51).

For the foregoing reasons we urge that this petition for a writ of certiorari be granted.*

Respectfully submitted,

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* If this petition is granted we will urge that the following two additional questions should be passed upon because they will necessarily arise at the new trial, if a new trial is ordered. This procedure was followed in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 708 (1962). The questions are not urged as reasons for granting the writ because they were not reached by the Court of Appeals.

(a) Whether the trial court erred as a matter of law in excluding evidence offered by plaintiff in support of its proof of lost profits in a monopolized market by restricting its proof to the range of its own profit rates from the time of the final judgment in the Government case until 1960 and excluding proof of the far higher range of profit rates of the defendant monopolist itself during the same period with the result that the jury was confined to a consideration of the range of plaintiff's profit rate and was not permitted to make any comparison between that range and the far higher range of defendant monopolist.

(b) Whether the trial court erred as a matter of law in intruding into the province of plaintiff's expert witnesses on damages and of the jury by substituting its own concepts of the total market of plaintiff and defendant monopolist in side and toe lasting machines and of the shares of each in the market and in the market for functionally related machines for the concepts proffered by plaintiff's experts.

APPENDIX A

Opinion of the Court

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6043.

INTERNATIONAL SHOE MACHINE CORPORATION,
PLAINTIFF, APPELLANT,

v.

UNITED SHOE MACHINERY CORPORATION,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Breck P. McAllister, with whom *Morton Myerson*, *Roger J. Hawke*, *Frank G. Dawson*, *Malloy, Sullivan & Myerson* and *Donovan, Leisure, Newton & Irvine* were on brief, for appellant.

Ralph M. Carson, with whom *Robert Proctor*, *Theodore Kiendl*, *Robert D. Salinger*, *John B. Reidelbuth*, and *Louis L. Stanton, Jr.*, were on brief, for appellee.

OPINION OF THE COURT.

March 11, 1963.

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment of the United States District Court for the District of Massachusetts dismissing the complaint entered upon a special verdict of the jury in an action brought by plaintiff-appellant, International Shoe Machine Corporation, against defendant-appellee, United Shoe Machinery Corporation, under Sections 4 and 5 of the Clayton Act (Act of October 15, 1914, c. 323, §§ 4 and 5, 38 Stat. 731, 15 U.S.C. §§ 15 and 16) to recover treble damages for violation of Section

2 of the Sherman Act (Act of July 2, 1890, C. 647, 26 Stat. 209, 15 U.S.C. § 2).

Plaintiff is a Massachusetts corporation which manufactures machinery for use in the "lasting operation" of shoe construction. Defendant, a New Jersey corporation, manufactures machinery for use in all phases of shoe construction, including that used in the lasting operation.

The complaint, which was filed on December 14, 1956, alleged that beginning some time prior to 1938[1] and continuing to the date of the filing of the complaint, defendant had monopolized trade and commerce in the shoe machinery industry and the parts thereof in violation of Section 2 of the Sherman Act and had thus prevented plaintiff from obtaining a fair competitive share of the market in such industry. The complaint alleged a substantial loss of profits to plaintiff owing to the alleged monopolization and prayed judgment for three times the damages sustained.

The complaint further alleged that on February 18, 1953, in the case of *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (aff'd per curiam 347 U.S. 521 (1954)), a final decree was entered in the United States District Court for the District of Massachusetts finding that appellee had violated the antitrust laws and further stated that "Pursuant to Section 5 of the Clayton Act, plaintiff intends to use said final decree against defendant as *prima facie* evidence as to all matters respecting which the said final decree would be an estoppel between the parties thereto."

The defendant answered and relying upon the 1955 amendments to the Clayton Act (69 Stat. 283, 15 U.S.C. § 15(b)), moved under Rule 56(b), 28 U.S.C., for partial summary judgment insofar as the plaintiff's complaint purported to assert any cause of action arising more than

[1] 1938 was the year of plaintiff's incorporation.

four years prior to the filing of the complaint, that is prior to December 14, 1952. The district court denied this motion and defendant appealed.

In our opinion reversing the district court, *United Shoe Mach. Corp.* v. *International Shoe M. Corp.*, 275 F.2d 459 (1st Cir. 1960), we agreed with defendant that the statute of limitations precluded plaintiff from asserting any cause of action which might have accrued prior to December 14, 1952. The thrust of this ruling was to require plaintiff to demonstrate injury resulting from antitrust violations in the four year period immediately prior to the filing of the complaint—December 14, 1952 through December 14, 1956—if it was to be successful in the instant action.

At a pre-trial conference on August 21, 1961 plaintiff requested an order permitting introduction, at any time during the trial, of the final decree, parts of the findings of fact and the opinion in the so-called "Government case,"[2] stating that said decree and findings should constitute *prima facie* evidence. Plaintiff also requested an order permitting introduction into evidence of the parties' background and competitive activities since 1938, and of customers' reasons for refusing to deal with plaintiff.

On October 24, 1961 the district court issued a pre-trial order which included the following:

> "4. Decision on the admissibility of the decree, findings, or any portion whatever of the proceedings before Wyzanski, D.J. in the case of *United States* v. *United Shoe Machinery Corporation*, 110 F.Supp. 295, is deferred until the close of plaintiff's other evidence at the trial, at which time decision can be made in the light of this fully developed evidence. Until the Court decides what, if any, of said material

[2] This terminology has been consistently utilized throughout the instant proceedings in referring to *United States* v. *United Shoe Machinery Corp.*, *supra*, and we shall adopt it herein.

is admissible, no reference to any aspect of the case of *United States* v. *United Shoe Machinery Corporation, supra,* shall be made in the hearing of the jury by the parties in either the opening or at any other time prior to said ruling.

"5. Either party may introduce relevant evidence as to the background of the parties and of the shoe machinery industry at any time since the founding of plaintiff corporation in 1938, provided that nothing in this clause shall in any way modify or affect the provisions regarding order of proof or exclusion of evidence established by any other clause of this pretrial order."

At the close of plaintiff's evidence on monopolization and injury, the admissibility of the decree and findings in the Government case was again argued. On April 2, 1962 the court again held these to be inadmissible and amended the pretrial order as follows:

"1. No part of the decree, findings of fact, or conclusions of law from *United States* v. *United Shoe Machinery Corporation, supra,* will be admitted in evidence as evidence of violation of the Antitrust laws of the United States;

. . . . . ."

Defendant moved for a directed verdict at the close of plaintiff's case and again upon the completion of the whole case. The court reserved decision, and submitted to the jury the following five special questions posed pursuant to the provisions of Fed. Rules Civ. Proc. Rule 49, 28 U.S.C., to which neither party objected:

"Question 1. Do you find by a preponderance of the evidence that during the period from December 14, 1952 to December 14, 1956, the defendant United Shoe Machinery Corporation committed acts of monopolization so as to control and dominate interstate

trade and commerce in the distribution of shoe machinery (other than Dry Thread Sewing Machines) in the United States, to such an extent as to exclude actual and potential competitors from that field of interstate commerce? Answer yes or no.

"Question 2. Do you find upon a preponderance of the evidence that during the period from December 14, 1952 to December 14, 1956, defendant United Shoe Machinery Corporation committed acts of monopolization so as to control and dominate interstate commerce in side and toe lasting machines to such an extent as to exclude actual and potential competitors from interstate commerce in side and toe lasting machines? Answer yes or no.

"Question No. 3:

"Do you find upon a preponderance of the evidence that such acts of monopolization during that period were the proximate cause of injury to the business or property of the plaintiff? Answer yes or no.

"Question No. 4:

"Do you find upon a preponderance of the evidence that such injury as you have found to the business or property of the plaintiff in the period December 14, 1952 to December 14, 1956, did proximately cause monetary damage in the form of lost profits to the plaintiff in the period beginning December 14, 1952 and ending December 31, 1959, which are capable of reasonable calculation and determination?

"Question No. 5: What is the amount, if any, measured in dollars, which you find from the preponderance of the evidence that the plaintiff was damaged? State such amount or 'none' in the following blank space to indicate your finding."

Appendix A
Opinion of the Court

The jury answered the first question—relating to defendant's monopolization in the distribution of shoe machinery generally—in the affirmative. However, it answered question 2—relative to defendant's monopolization in the special area of side and toe lasting machinery—in the negative. The jury also answered "no" to question 3 concerning putative injury to plaintiff by defendant during the limitations period. Thereupon, it was unnecessary for the jury to answer questions 4 and 5. Judgment for the defendant was entered upon this verdict on May 14, 1962.

Plaintiff moved to vacate judgment and for a new trial on the grounds, *inter alia*, that the jury's answers to questions 1 and 2 were inconsistent and against the weight of the evidence, and that the decree and findings in the Government case should have been allowed in evidence. The trial court denied this motion. *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.*, 206 F.Supp. 949 (D.C. Mass. 1962).

Plaintiff's argument on this appeal rests principally on the asserted error of the trial judge in excluding the final decree and certain findings of fact and conclusions in *United States* v. *United Shoe Machinery Corporation*, *supra*, (hereinafter the "Government case"). It is plaintiff's contention that the decree, findings and conclusions were admissible under Section 5 of the Clayton Act and were "relevant" both to plaintiff's proof of monopolization during the limitations period from December 14, 1952 to December 14, 1956[3] and to plaintiff's alleged damages.

The legislative history is clear that Congress enacted Section 5 of the Clayton Act to encourage treble damage suits by lessening the plaintiff's required proof and liti-

[3] Plaintiff also contends that these matters are relevant as essential "background" evidence of conditions within the shoe industry prior to the commencement of the limitations period.

gation expenses in the usually complex, time consuming and expensive area of antitrust litigation. See H. R. Rep. No. 627, 63 Cong. 2d Sess. 14; S. Rep. No. 698, 63 Cong. 2d Sess. 45; 51 Cong. Rec. 9270, 9490, 13861; see also *Hamilton & Till*, Antitrust In Action 83 (T N E C Monograph 16, 1940). To this end, Congress embodied as Section 5 a provision allowing treble damage plaintiffs to make use of judgments obtained by the Government in a prior action. This provision permits private plaintiffs to utilize "A final judgment or decree" as *prima facie* evidence of "all matters respecting which . . . [the] judgment would be an estoppel as between the" defendants and the Government.[4]

The question here, as before the trial court, is the proper evidentiary effect to be accorded the prior Government decree. In *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951), the Court in defining the relevant principles as to the scope of Section 5 stated that the *prima facie* effect of a prior judgment ". . . extends only to questions 'distinctly put in issue and directly determined' in the [prior proceeding] . . . [and that] plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." 340 U. S. at 569.

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[4] Section 5 states in pertinent part:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

Emich, consequently, indicated that recourse should be had to the principles of collateral estoppel in ascertaining the issues on which the prior judgment is evidence. See also, *Fifth and Walnut v. Loew's Incorporated*, 176 F.2d 587, 593 (2nd Cir. 1949), cert. denied, 338 U.S. 894. In effect, under traditional principles, the evidentary impact of Section 5 should be limited to those issues which were "actually litigated and determined" by the judgment or decree in the prior case. See Restatement, Judgments, § 68 (1) (1942).[5]

Moreover, for a private litigant to derive the benefits of Section 5 from a prior Government judgment, he must not only meet the estoppel requirements of the section but must also show that the former decree or judgment is *relevant* to his own cause of action. This is to say that it is not enough for a plaintiff to demonstrate that a defendant has violated the antitrust laws generally. Rather, he must show that his claimed injury stemmed directly and proximately from the same type of practice condemned in the prior Government action. *Monticello Tobacco Co. v. American Tobacco Co.*, 197 F.2d 629, 631 (2nd Cir. 1952), cert. denied, 344 U.S. 875. See, *Eagle Lion Studios v. Loew's, Inc.*, 248 F.2d 438, 444, 445 (2nd Cir. 1957), aff'd per curiam by an equally divided Court, 358 U.S. 100 (1958); *Shotkin v. General Electric Co.*, 171 F.2d 236, 238 (10th Cir. 1948). In short, before a plaintiff can invoke the mantle of Section 5 he must successfully meet both the statutory requirements of estoppel as well as the generic evidentiary test of admissibility—relevancy.

In excluding the prior decree, findings and conclusions, the trial court predicated its decision on the ground that:

[5] For a comprehensive review of collateral estoppel, see Developments in the Law — Res Judicata, 65 Harv. L. Rev. 818, 840-50 (1952).

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Opinion of the Court

> "In the Government case Judge Wyzanski closed the taking of evidence as of a date in June of 1951, some 18 months prior to the period which is open to the plaintiff in the instant case, namely, the period December 14, 1952 to December 14, 1956.
>
> "I do not read Judge Wyzanski's findings of fact as reflecting that any conduct of defendant which occurred between December 14, 1952 and December 14, 1956 was put in issue or litigated in the Government case."

In sum, taking the closing of the evidence in the Government case—June 1951—as the determinative date, the trial court rested its decision on a difference in the time periods involved in the two actions.

In plaintiff's view, focusing on the date of "the close of the evidence" was the trial court's basic error. According to plaintiff, the date on which the evidence closes has no significance in terms of Section 5 since the statute speaks in terms of a "final judgment or decree" which "shall be prima facie evidence." Consequently, according to plaintiff, in assaying a putative difference in the time periods of the actions under scrutiny, the determinative reference is to the date of the final decree.

Briefly stated, the chronology of the terminal stage of the Government case is as follows:

(1) Date of the close of evidence—June, 1951;
(2) Decree, findings of fact and conclusions of law entered by District Court—February 18, 1953;
(3) Affirmance by Supreme Court—May 17, 1954;
(4) Approval by District Court of a final plan for terminating the proscribed practices—June 1, 1955.

Upon examination of the foregoing chronology it is apparent, as pointed out by the district court, that the date of the close of the evidence antedates the limitations period

open to plaintiff by some eighteen months. On the other hand, the other cited dates are within the limitations period —December 14, 1952 to December 14, 1956.

Selection of the determinative date has significant consequences. If the identical anti-competitive practices proscribed by the Government proceedings occurred during the same time period as that involved in the subsequent private action, there is little question that the estoppel requirements of Section 5 would be satisfied since the subject matter of the private suit could be regarded as but a contemporaneous manifestation of the activities condemned in the Government case. It would appear that this is the classical situation contemplated by Section 5. In such a case, with the estoppel requirements of Section 5 satisfied, relevancy could be assumed. However, if the pertinent practices involved in the Government case were adjudicated against the background of a time period different from that involved in the subsequent private proceeding, then, under traditional principles, Section 5's estoppel requirements seemingly would not be satisfied and a relevancy question would not arise.[6]

"Traditional" principles which would apparently render inapplicable invocation of collateral estoppel considerations include the rule that the passage of time may evoke change of circumstances which preclude the creation of an estoppel. See, *e.g.*, *City of Shreveport* v. *Shreveport Ry. Co.*, 38 F.2d 945 (5th Cir. 1930), cert. denied, 281 U.S. 763, and the principle that matters adjudged as to one time period are not necessarily an estoppel as to other time periods. Cf., *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). As was stated in *National Bank of Louisville* v. *Stone, Auditor*, 174 U.S. 432, 434 (1899): "A question cannot be held to have

[6] Unless this question became pertinent on the question of admitting the prior decree as "background" evidence. See *infra*.

been adjudged before an issue on the subject could possibly have arisen."

In many instances courts have noted a difference in the time periods involved in the Government and subsequent private actions in rendering the prior judgment inadmissible under Section 5. *Park Neponset Corporation* v. *Smith*, 258 F.2d 452 (1st Cir. 1958); *Eagle Lion Studios* v. *Loew's, Inc., supra; Paramount Film Distributing Corp.* v. *Village Theatres*, 228 F.2d 721 (10th Cir. 1955); *Robbinsdale Amusc. Corp.* v. *Warner Bros. P. Dist. Corp.*, 141 F. Supp. 134 (D.C. Minn. 1955). Cf., *Shotkin* v. *General Electric Co., supra; Wolfe* v. *National Lead Co.*, 15 F.R.D. 61 (N.D. Cal. 1953), aff'd. 225 F.2d 427 (9th Cir. 1955), cert. denied, 350 U.S. 883 (1955). As was stated in *Orbo Theatre Corporation* v. *Loew's, Incorporated*, 156 F. Supp. 770, 777 (D.C.D.C. 1957), aff'd. 261 F.2d 380 (D.C. Cir. 1958), cert. denied, 359 U.S. 943 (1959), "It should be emphasized that under the above quoted statute [Section 5] the [prior] decree is prima facie evidence only of a conspiracy covering the same area *and existing during the same time as that involved in the case on trial.*" (Emphasis supplied.)

In *Park Neponset, supra*—a treble damage suit—we approved the action of the district court in completely excluding from evidence the findings, conclusions and decree entered in a prior Government case. There we pointed out that while the excluded findings related to the competitive situation of 1945, the plaintiff's theatre did not commence operation until 1947. Consonant with the principles evoked in the above cited cases, the district judge in the instant case excluded the Government decree on the ground that the activities found illegal in the prior proceeding did not, in the language of *Orbo Theatre Corp., supra*, exist "during the same time as that involved in the case on trial," but, at least, some eighteen months prior thereto.

Appendix A
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Plaintiff, while apparently conceding the correctness of the result in a case such as *Park Neponset, supra*, attempts to distinguish it on the basis that in that case the findings were "expressly stated" to show the situation in 1945 while the plaintiff did not commence operation, as noted above, until 1947. Here, plaintiff continues, "the relevant findings in the Government case upon which appellant relies are not limited to any specific date." Plaintiff then seeks to buttress this distinction by noting that the findings of the district judge in the Government case "speak in the present tense throughout" and, consequently, "all of the . . . findings are made as of the date of their making on February 18, 1953 by the very words that are used." The net of this argument, of course, would be to move the Government action within the "same time period" as that open to plaintiff and obviate the obstacles to the Section 5 estoppel considerations canvassed above.

We are unwilling to accept plaintiff's contentions because they not only emphasize form over substance but ask us to close our eyes to the realities of what occurred in the Government case. It is undisputed that the last item of evidence which the district judge received in the Government case and upon which he rested his decision was admitted as of a date in June, 1951. There is no contention that any evidence touching on the environmental and competitive context of the shoe industry came to the court's attention in the interim period between the close of evidence and the announcement of findings. Perforce, quite apart from whether or not the findings of the trial judge "were expressly stated to show the situation" as of the date in June, 1951, when the evidence closed, they plainly could not reflect a competitive situation subsequent to that date, else they would be grounded on speculation and not evidence. Findings, to use Justice Frankfurter's phrase in another context, are "not drawn, like nitrogen, out of

the air."[7] Rather, they can only have been quarried from the evidence adduced at the trial, upon which they must be bottomed and from which they cannot be severed without mutilating their significance. In the Government case, the development of the evidential complex terminated in June, 1951 and so far as the findings and the decree are concerned, they can speak no later than this date.

The Government case, to use the district court's own words, involved "a trial of prodigious length." Some five years elapsed between the filing of the complaint on December 15, 1947 and the close of the evidence in June, 1951. Thousands of exhibits, interrogatories, depositions and a wealth of testimony had to be sifted and evaluated by the district judge in making his findings and formulating an appropriate decree.[8] Appraisal and evaluation of the plethora of evidence required thoughtful consideration and this, in turn, required time, without which there could be neither the reflection nor the deliberation essential to a knowledgeable judgment. In the Government case this period extended for some eighteen months. In view of the scope and complexity of the issues there involved, the elapse of this time is not surprising. The point is that however long may be required for the trial judge to weigh the evidence, find the facts, decide the issues and formulate the decree, the ultimate judgment relates only to the period embraced by the evidence adduced at the trial. Cf., *United*

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[7] Frankfurter, Reflections on Reading Statutes, The Record of the Association (of the Bar of the City of New York), Vol. 2, pp. 213, 235 (1947).

[8] "The complaint [in the Government case] charge[d] the defendant with monopolizing and attempting to monopolize interstate trade and commerce in the shoe machinery industry from the year 1912 until the filing of the complaint on December 15, 1947. That span of years covers most of the corporate life of a company engaged in a specialized, skilled and technical trade." McAllister, "The Big Case: Procedural Problems In Antitrust Litigation, 64 Harv. L. Rev. 27, 39 (1950).

States v. *Waskowski*, 158 F.2d 962 (7th Cir. 1947); *Johnson* v. *Fleming*, 264 F.2d 322 (10th Cir. 1959). Thus, evidentially speaking, though the decree was handed down in 1953 it spoke—so far as the determinative time period for our purposes is concerned—as of June, 1951.

Nor can we attach significance to plaintiff's argument that the trial judge's language was cast "in the present tense." We do not believe that considerations of estoppel should turn on the happenstance of style or syntax when the record clearly indicates that the language, though speaking in the present tense, related to a date at least eighteen months in the past.

It is of course true that Section 5 speaks in terms of "a final judgment" which "shall be prima facie." However, notwithstanding that fact, we believe that plaintiff reads too much into this language when it argues that the "trial court erred in giving any significance to the date of the close of the evidence [since] that date has no signficance under the statutory language."

The statutory requirement that the judgment or decree be final before it may be admitted into evidence in a subsequent proceeding contemplates a "final disposition of the case, i.e., a final judgment by reason of failure to appeal within the statutory period, or a final judgment by reason of an affirmance of the court of last resort." *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 369 (D.C. Minn. 1939), aff'd, 119 F.2d 747 (8th Cir. 1941), cert. denied, 314 U.S. 644 (1941). See, *Fifth and Walnut* v. *Loew's Incorporated*, 176 F.2d 587, 592-94 (2nd Cir. 1949); *Duluth Theatre Corporation* v. *Paramount Pictures*, 72 F. Supp. 625 (D.C. Minn. 1947).

These cases recognize the principle that until there has been a terminus to the litigation, the judgment or decree is not final and may not be utilized as prima facie evidence. Needless to say, if there remains the possibility that the

result dictated by the action of an inferior court may be reversed by a higher tribunal, the evidentiary impact of the judgment will be delusively imprecise. To obviate such a contingency, the statute imports the salutary principle of finality of judgment. However, to say that a judgment must be final before a plaintiff may introduce it under Section 5 is not to imply that in assaying the estoppel requirements of this same action, a court must close its eyes or "attach no significance" to the date of the close of the evidence. We believe that this date may, as in this case, have a relevance and a significance in providing the chronological guideline and fixing the time period limitations as to what "questions [were] distinctly put in issue and directly determined [in the prior proceeding]." *Emich Motors Corp., supra,* at 569.

In the Government case the court found the defendant's leasing activity to be violative of the Sherman Act on the ground that certain provisions of the leases were inimical to the development of competition "in the context of the present shoe machinery field." Plaintiff has placed great reliance on the fact that the record in the instant case indicates that the same leases involved in the Government case were utilized by the defendant during the limitations period of the present case. And, in plaintiff's words, this fact makes the decree, findings and conclusions in the Government case "*relevant* prima facie evidence to which appellant is entitled under Section 5." Again, we believe that plaintiff confuses relevancy with the estoppel requirements of Section 5. As noted above, under Section 5, *relevancy* does not become material until a plaintiff has cleared the statutory hurdle of estoppel and, in this case, we do not believe that plaintiff has done so.

We do not read the trial court's ruling in the Government case as holding that leases of the kind utilized by the defendant are *per se* violations of the antitrust laws. Cf.,

International Salt Co. v. *U. S.*, 332 U.S. 392 (1947). Rather, in the language of the trial court: "In short, the leases themselves are not forbidden; only when they are used as an instrument for seeking [or maintaining] market control is the lessor to be charged with [restraint of trade or monopolizing]." *United States* v. *United Shoe Machinery Corp.*, *supra*, at 346.

Again, the violation in the Government case was found in the "context" of the shoe machinery field during the time period there under scrutiny; a period which, in our view, could be of a date no later than June, 1951 and, from many of the trial judge's specific references, was essentially bottomed on the defendant's competitive posture in the 1947-49 market.

In at least one significant facet, this was not the same "context" which existed in the shoe machinery industry—and specifically in the specialized market of side and toe lasting machinery at issue here—during the instant limitations period. Two of plaintiff's three major pieces of equipment were commercially introduced into the market after the close of the evidence in the Government case. One of these machines apparently embodied a technological break-through which produced spectacular commercial success for plaintiff; with a demand which far outstripped supply and which strained plaintiff's productice capacity to the utmost. This machine was apparently a highly coveted item in many segments of the industry and its availability was a competitive factor which was missing from the "context" of the side and toe lasting market in the Government case.

It cannot be gainsaid that in any meaningful appraisal of the adverse or anti-competitive effects of devices alleged to restrict the freedom of buyers to purchase from competing suppliers, the extent to which there is a dimunition of competition in the relevant market, will depend upon

the degree of need for the controlled product and the availability of adequate and desirable substitutes. The machines which plaintiff introduced into the post-1951 market were assuredly pertinent factors in any assessment of the context of the competitive environment and structure within the relevant market for side and toe lasting machinery. Failure to accord due emphasis to changed competitive conditions, such as those cited above, would amount to a judgment on the sum of the many market relationships called competition which had scarcely more validity than "a guess in the dark." *Standard Oil Co.* v. *United States*, 337 U.S. 293, 322 (1949) (dissenting opinion).

For the foregoing reasons we believe that the trial court was correct in holding inadmissible under Section 5 the decree, findings and opinion in the Government case.

The next question concerns the plaintiff's argument that these items should have been admitted as "background" evidence. In the words of plaintiff: "Even if we are incorrect in urging that the operative date under Section 5 is the effective date of the final decree on June 1, 1955, the decree and the findings and conclusions are still relevant and material as essential background to appellant's other proof of monopolization of lasting machines and of injury to its business or property in the limitations period itself."

Again we are unwilling to accept plaintiff's contention. While plaintiff continually stresses the relevancy of these matters, relevancy is not the only factor to be considered by a court in determining the admissibility of evidence of this character. Courts traditionally must weigh the probative value of the evidence sought to be admitted against the capacity for prejudice which the evidence might engender. Where the prejudice quotient is high, this fact will frequently render inadmissible evidence which—from a purely logical standpoint—may have a significant proba-

tive thrust. See generally, McCormick, Evidence, 315-21 (1954). As was stated in *Loew's, Inc.* v. *Cole*, 185 F.2d 641, 661 (9th Cir. 1950), cert. denied, 340 U.S. 954 (1951): "'[I]f certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, . . . there is good ground for excluding such evidence unless it is indispensable for its legitimate purpose.'" (Quoting Wigmore on Evidence.)

We believe this principle is particularly apposite in the present proceeding. Whether admitted purely as "background" evidence or not, evidence of a judicial determination of prior illegal conduct on the part of the defendant cannot help but have a great emotive impact on a jury. As Wigmore states: "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with any jury, in or out of court." 1 Wigmore, Evidence, § 57 (3d ed. 1940).

"It is of course well settled that evidence that a defendant had, in the past, committed illegal acts is not admissible to show that he has a proclivity towards similar wrongs in a subsequent proceeding. See generally, Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 Harv. L. Rev. 954 (1933); Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988 (1938). 1 Wigmore, Evidence, § 64 (3d ed. 1940).

Moreover, it is clear that if common law rules of admissibility were applied, a plaintiff would be unable to derive evidentiary benefit from the prior Government judgment. *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55, 63 (1918). Until the advent of Section 5, these judgments were unavailable to a private plaintiff. In making this change, Congress delimited use of the prior judgment to

those precisely defined situations meeting the requirements of Section 5. Where, as here, a plaintiff does not meet the statutory requirements of Section 5, we believe that it would be unwarranted to allow it to attempt to do indirectly what it is foreclosed from doing direcly. Absent the mantle of Section 5, if a plaintiff has the independent evidence to demonstrate antitrust violation and injury during the appropriate limitations period, then it would seem that he would not have to resort to a judgment obtained in a prior proceeding as "background." If he does not have the independent evidence, we do not believe that he should be able to use the prior judgment as a crutch in the attempt to supply the essential elements of his action. It would be subversive of the purpose of Section 5 to permit the introduction of a prior decree or judgment "merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.'" *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629, 632 (2nd Cir. 1952), cert. denied, 344 U.S. 875.

Finally, plaintiff argues at length that the trial court committed prejudicial error in limiting its development of the evidence in the pre-limitations period. Plaintiff urges that the trial court erroneously regarded the limitations period as controlling the admissibility of evidence.

It is of course true that the statute of limitations does not govern the admissibility of evidence and that this question is controlled by rules independent of a limitations question. *Klein* v. *American Luggage Works, Inc.*, 206 F. Supp. 924, 936 (D.C. Del. 1962). Cf., *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 709, 710 (1962). However, in the *Continental case, supra*, the Supreme Court made clear that: "We do not mean that a trial court may not place reasonable limits upon such evidence or set a reasonable cut-off date, evidence before which point is to be considered

too remote to have sufficient probative value to justify burdening the record with it." Id., at 710.

A careful examination of the record convinces us that the trial court understood and correctly applied both of the foregoing principles.

Thus, in his pretrial order of October 24, 1961, at the very outset of the trial, the court expressly stated: "Either party may introduce relevant evidence as to the background of the parties and of the shoe machinery industry at any time since the founding of plaintiff corporation in 1938, . . .," while, simultaneously indicating that the allowance of such evidence would be subject to its prior ruling against reference to the Government case. We believe that the court's rulings throughout the course of the trial were characterized by the desire to accommodate these competing considerations while delimiting the blanket of evidence —much of it repetitious and rambling—to manageable proportions. In this we believe it was successful.

In short, we believe that the trial court did not unduly restrict the presentation of the plaintiff's case. Moreover, even if it be conceded that the trial court may have been severe in certain of its rulings on plaintiff's proof, we believe that any error in this regard was cured by the jury's affirmative answer to question 1, supra.

We have considered the other points raised by plaintiff and believe that they do not require discussion in this opinion.

A judgment will be entered affirming the judgment of the district court.

Appendix A
Judgment

On the same day, March 11, 1963, the following judgment was entered:

JUDGMENT
March 11, 1963

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/S/ Roger A. Stinchfield
Clerk.

Thereafter, on March 26, 1963, mandate issued and the original papers were returned to the District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 191

INTERNATIONAL SHOE MACHINE CORPORATION,

Petitioner,

—against—

UNITED SHOE MACHINERY CORPORATION,

Respondent.

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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June 27 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

INTERNATIONAL SHOE MACHINE CORPORATION, *Petitioner,* —*against*— UNITED SHOE MACHINERY CORPORATION, *Respondent.*	No. 1163

RESPONDENT'S BRIEF OPPOSING CERTIORARI

Citation to Opinions Below

The opinion of the United States Court of Appeals for the First Circuit filed March 11 1963, reprinted as Appendix A to the petition, is officially reported in the advance sheets as 315 F. 2d 449. The District Court's denial of petitioner's motion to vacate judgment is officially reported at 206 F. Supp. 949.

Statement of the Case

Petitioner's Statement (pp. 5-8) is inadequate or incorrect in the following particulars:

1. A prior decision of the First Circuit Court of Appeals granted respondent judgment absolute as to any and all causes of action which accrued before December 14 1952.

275 F. 2d 459. Review by certiorari was not sought, although in a comparable case brought for Hernjan Schwabe, Inc. by the same attorneys against this respondent certiorari was denied by this Court April 30 1962, 369 US 865, and rehearing denied 370 US 920.

2. The careful opinion of the First Circuit Court of Appeals affirming the judgment upon the trial, which occupies 20 pages of petitioner's appendix, reviewed a trial which commenced February 6 1962 before the district judge and a jury, consumed 39 court days (after several days of a first trial terminated by the illness of a juror), and is reflected in a transcript of 5100 pages in addition to hundreds of exhibits. In this long trial petitioner's organizer, chief executive and principal stockholder, Mr. J. S. Kamborian, never ventured to take the witness stand—a fact doubtless noted by the jury.

3. Petitioner's statement that the trial Judge "refused to permit plaintiff to examine witnesses concerning the effect of the Government case and the change in business practices . . ." (Pet. 7) is untrue. The record is full of instances reflecting the introduction of optional sales by respondent, the elimination of non-segregated repair service, the elimination of return charges, and other changes of practice, all effective about June 1 1955 and all pursuant to the Government decree. Such instances are in the printed appendices at PR[1] 286-9, 290, 1783, 1796, 1823-4 and are collected in PR 1429-32 (summation of petitioner's counsel).

4. The statement that the Judge's provision in the pretrial order for the introduction of relevant background evidence "was simply ignored by the trial court" (Pet. 12

[1]This citation "PR" appears in the petition and refers to petitioner's record as filed June 7. We use the same abbreviation and for respondent's record use RR.

fn.) is also untrue. Background material not only was contemplated by the pre-trial order (PR 15) but was received on the examination of such important witnesses as respondent's chairman George Brown (PR 146, 159), and petitioner's machinery expert Peter DePesa (PR 63-71). Sometimes of course this kind of material was properly excluded as irrelevant or cumulative.

5. While refusing to receive in evidence in this 1953-6 case Judge Wyzanski's findings which could speak only of conditions existing up to July 1951; and also his decree pursuant to such findings, the trial Judge instructed the jury fully as to monopolization and the means of monopolization (PR 1404-70). The trial Judge intended to and did state the law to the jury substantially on the basis of Judge Wyzanski's conclusions (PR 1080). These instructions embodied and explained the specific criticisms of respondent's leasing system which Judge Wyzanski had made in the Government case, 110 F. Supp. 295, affd. 347 US 521, and were not excepted to by petitioner.

6. That the jury fully understood these instructions is shown by its answer to Question 1 to the effect that in the 1953-6 period respondent had committed acts of monopolization with respect to the general shoe machinery field (PR 1465, Pet. 7-8), although not with respect to the sub-market of side- and toe-lasting machines to which petitioner almost entirely confined itself (Question 2, PR 1465; Pet. 8). As noted by the court below this sub-market had changed sharply since the close of evidence in the Government case (Pet. App. 16, 315 F. 2d at 458). The affirmative answer to Question 1 was admitted by petitioner to have cured the error charged as to the exclusion of the decree generally. In its brief in the Court of Appeals petitioner said (p. 18):

"The jury's affirmative answer to (1) cures whatever error might have been urged as to the relevance of the final decree in support of appellant's other proof of monopolization of the shoe machinery trade as a whole."[2]

Reasons for Denying the Writ

The two grounds alleged under Rule 19 subd. 1(b) are quite without substance in terms of this record and present no important question of Federal law.

1. The claim that construction by the courts below of Clayton Act § 5 conflicts with and disregards its language (Pet. 9) is quite untenable because that construction turns upon the concept of "estoppel" adopted by Congress in the Clayton Act. The meaning and function of that word in the statute, as extending only to questions distinctly put in issue and directly determined in the Government suit, cannot be in doubt. *Emich Motors Corp.* v. *General Motors Corp.* 340 US 559, 569; *Cromwell* v. *County of Sac* 94 US 351, 353; *Lawlor* v. *National Screen Service Corp.* 349 US 322, 326; *Third National Bank of Louisville* v. *Stone* 174 US 432, 434. The collateral estoppel doctrine requires that both the first and the second proceeding involve the same set of events or documents and the same bundle of legal principles. *Commissioner* v. *Sunnen* 333 US 591, 601-2.

Judge Caffrey on the trial considered and applied the *Emich* case (PR 1085-6). We submit he did so correctly.

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[2]While in the next sentence of this brief petitioner asserted that the negative answer to Question 2 placed the jury "in the incongruous position of finding that monopolization of the whole does not include monopolization of an important part of the whole", the rule as to resolution of alleged inconsistencies in a special verdict is here pertinent. *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.* 369 US 355, 364; and no claim of irreconcilable inconsistency appears in the petition.

In colloquy with counsel on admissibility the trial Judge made the point perfectly clear (PR 222):

> "But my present thinking is, the res adjudicata effect of the government case does not go beyond what was or might have been proved in the case.
>
> I don't conceive it is legally possible to prove in 1953 a fellow was doing something in violation of the antitrust laws in 1955 and 1956. I don't see how it will be prima facie proof of injury, to help the plaintiff in this case. It is my thinking on the government case."

In like manner, the Court of Appeals' opinion cites numerous cases in other circuits approving the practice followed below (Pet. App. 8, 10, 11; 315 F. 2d at 454-6). No conflict among the circuits is claimed in the petition.

We submit the application of Clayton Act § 5 which was made below in strict accordance with prior decisions of this Court is the common-sense and the only just construction of the statute. Acceptance of petitioner's thesis would wrongly permit a treble-damage plaintiff to employ the Government decree on evidence covering a period for which respondent already has judgment, merely "for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing'", (Clark J. in *Monticello Tobacco Co.* v. *American Tobacco Co.* 197 F. 2d 629, 632, cert. den. 344 US 875). Nor is petitioner's case strengthened by its urging that rejection thereof would weaken and impair the efficacy of private actions in complementing the Government in the enforcement of the antitrust laws (Pet. 9), and defeat the purpose of Congress of minimizing the burdens of litigation for injured private suitors, etc. (Pet. 10). The purposes cited are not to be served by departure from the clear statutory meaning and the commission of a plain injustice.

The insistence upon the *date* of the judgment or decree as the only measure of the extent of the estoppel (Pet. 10) is hopelessly artificial, and was well dealt with in the fully-considered opinion of the Court of Appeals (Pet. App. 10-14, 315 F. 2d at 457).

Especially vulnerable is the claim that "The record facts are surely presumed to continue until decision is reached . . ." (Pet. 11). This claimed "presumption" is elaborately negatived by the record here. The sub-market which petitioner in reality almost dominated (viz. side- and toe-lasting machines employing cement) was developed by it very largely after June 1951, when the evidence in the Government case closed. The showing in the record on this point is summarized in a page of the Court of Appeals' opinion (Pet. App. 16-7, 315 F. 2d at 458), and petitioner's submission here is particularly defective for omitting all mention of this important development which differentiates the period covered by the Government record from the 1953-6 period here relevant.

In finding the petitioner was not the victim of monopolization in its special sub-market, the jury acted upon a great volume of evidence, such as the introduction of petitioner's Model C toe laster in mid-1955 (Ganley RR 430; Thompson RR 520), the development of improved cements in 1955-6 (Ganley RR 443, 458; Thompson RR 499; Carr RR 625; Mendl RR 1121-23; Ex. AP, AJ, AK, AL, AO, AR), the perfected models of toe laster and thermalaster in 1955-6 (Volenetz RR 573-4; Stix RR 609; Carr RR 646; Ex. I, BV, CM, DF, GQ, HU, TE, VR, VT). These special facts of the instant case deprive the points emphasized by petitioner of general importance for the law as a whole.

2. The further ground asserted that the Court of Appeals compounded its "basic error" by confining peti-

tioner's proof to the four-year limitations period, is not warranted by the record which shows frequent reception of background evidence within the exercise of a proper judicial discretion (see pp. 2-3 above). As indicated by the argument at Pet. 12, the real purpose at all times was to get before the jury for their prejudicial effect the extensive findings and decree in the Government case covering the irrelevant and barred period. The assertion that the decree and findings were "essential and relevant background" for proof of monopolization *during* the limitations period is patently hollow in a case where a record of 5100 pages was accumulated for the four years in question. Up to June 1 1955 the Form A lease provisions which Judge Wyzanski criticized were in effect, and indeed leases at the option of the lessees continued in effect after June 1 1955 stripped of most of these provisions. This fact was shown in petitioner's case (e.g. PR 1253-4, 1273, 1562-4), but necessarily petitioner was confined to the facts and circumstances of the limitations period itself for proof of the manner in which the Form A leases operated subsequent to the bar of limitations.

That petitioner fully availed of the opportunity to put in evidence as to this period, including evidence concerning the Form A lease terms objected to, appears from the summation of its counsel at PR 1417-27 and 1430-3. To have let into this jury action for damages the full scope of the findings in the Government's equity suit covering a period of 30 years or more, as petitioner insists (Pet. 14), would not only have violated the terms of the existing judgment between the parties but have completely confused the issues. The Court of Appeals was right in concluding that the trial court did not unduly restrict presentation of the petitioner's case (Pet. App. 20, 315 F. 2d at 460).

Conclusion

The petition shows no merit and the writ should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 191

INTERNATIONAL SHOE MACHINE CORPORATION,
Petitioner,

against

UNITED SHOE MACHINERY CORPORATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1163

INTERNATIONAL SHOE MACHINE CORPORATION,

Petitioner,

against

UNITED SHOE MACHINERY CORPORATION,

Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

We cannot let stand two assertions in respondent's brief that statements in the Petition are "untrue." The very citations to the record to which respondent refers this Court in support of these assertions support the correctness of the statements challenged as "untrue."

1. In paragraph numbered 3 on p. 2 of its brief respondent brands as "untrue" the statement in our Petition that the trial court "refused to permit plaintiff to examine witnesses concerning the effect of the Government case and the change in business practices resulting therefrom . . ." (Petition p. 7). Respondent has omitted in its quotation from our Petition the important words "resulting therefrom." At no point would the court admit evidence that the

changes in respondent's business practices resulted from the Government case.

Respondent in its brief, p. 2, further misleads when it states that the changes of practice in 1955 were "all pursuant to the Government decree," as though that important fact was part of the record and known to the jury. This important fact was kept from the jury, as respondent well knows. Finally, the citations in support of the asserted untruth of our statement confirm its truth in every respect.

PR 286-9, 290: these citations show that the trial court, though carrying out in full its ruling barring any reference to the Government case, permitted the witness Brown, respondent's chairman, to answer whether the changes in respondent's business practices were "voluntary or involuntary," PR 287, but would not permit the witness to say what caused the changes, PR 289. What caused them was, of course, the Government decree. The jury was never permitted to know this key fact.

PR 1783, 1796, 1823-4: these again show the pains the trial court took to avoid even a hint to the jury that the Government case had ever existed. The references here involve rulings on reading from depositions.

PR 1429-32 (summation of petitioner's counsel): this reference shows that petitioner's counsel in his summation to the jury faithfully carried out the rulings of the court and made no mention of the Government case in describing the radical changes in defendant's business practices that occurred in 1955. Counsel carried out the "voluntary or involuntary" formula of the court, a point that must surely have left the jury puzzled and confused. Why were all these radical changes in United's business practices made

in 1955? The record before the jury is silent beyond the word that they were "involuntary." Why were they "involuntary"? The jury was not permitted to know.

2. In paragraph numbered 4 on pp. 2-3 of its brief respondent brands as "also untrue" the statement in our Petition that the pre-trial order which purported to permit either party to introduce relevant background evidence (PR 15) "was simply ignored by the trial court" (Petition p. 12, footnote*). In support, respondent has found in a transcript of 5100 pages and hundreds of exhibits perfunctory data identifying respondent's chairman Brown as having been in charge of the foreign operations of respondent from 1937-1949, PR 146, and a ruling by the court allowing similar data as to company history, PR 159. Finally, respondent cites the testimony of petitioner machinery expert De Pesa as to his personal experiences in shoe factories since high school days, PR 63-71.

None of the foregoing perfunctory evidence had any relevance whatsoever to the merits of the case.

The truth of our statement is supported not only by the exclusion of the matters in issue and determined by the Government decree, as we state in our Petition pp. 12-14, but also by the persistent exclusion of other evidence relevant and material to the proof of monopolization and injury within the limitations period. See Daniels PR 577-78, 591-592; Brown, PR 276, 290, 314, 327, 332-33, 373; Pl. Ex. 58 for id., PR 318-23; OMR bulletins, PR 218-23. We did not deem it necessary to develop this point in our Petition and will do so, as we did in the court below, in our brief if our Petition is granted.

Respectfully submitted,

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